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IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-1068

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,

Petitioner,

v.

ASSOCIATED DRY GOODS CORPORATION,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

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BRIEF FOR RESPONDENT IN OPPOSITION

ASSOCIATED DRY GOODS CORPORATION submits this brief in opposition to the Petition for a Writ of Certiorari filed by the Solicitor General on behalf of the EQUAL EMPLOYMENT OPPORTUNITY COMMISSION.

Opinions Below

The opinion of the court of appeals (App. A, 1a-13a)[1] is reported at 607 F.2d 1075. The opinion of the district court (App. D., 16a-32a) is reported at 454 F. Supp. 387. An earlier opinion of the district court, ruling upon the Com-

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[1] References contained in parentheses are to the Petition, and to the texts of the opinions and orders below, as well as to applicable statutes, regulations and excerpts from the EEOC Compliance Manual reproduced in the Petition and its Appendices.

mission's motion to dismiss Associated's suit, is reported at 419 F. Supp. 814.[2]

Jurisdiction

The jurisdictional requisites are adequately set forth in the Petition (Pet., 2).

Statutes and Regulations Involved

The pertinent provisions of Title VII of the Civil Rights Act of 1964, as amended (Sections 706(b) and 709(e), 42 U.S.C. §§2000e-5(b), 2000e-8(e)), and of the EEOC's procedural regulations (Sections 1601.22 and 1610.17(d), 29 C.F.R. §§1601.22, 1610.17(d)), are set forth in the Petition (at 2-4).[3] Section 83 of the EEOC Compliance Manual, providing instructions to agency personnel for the disclosure of information in Commission case files, has also been reproduced (App. E, 33a-46a).[4]

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[2] A memorandum and order of the district court for the Western District of Pennsylvania in E.E.O.C. v. Joseph Horne Co., a division of Associated Dry Goods Corporation, C.A. No. 76-707 (September 28, 1976), transferring to the Eastern District of Virginia a companion proceeding brought by the Commission to enforce its administrative subpoena, is not officially reported, but is unofficially reported at 13 FEP Cases 892.

[3] Section 1601.22 supersedes former section 1601.20, which was in effect at the time this suit arose. 29 C.F.R. §1601.20 (1975). The old provision is quoted in the district court's opinion (App. D, 19a n.2).

[4] Section 83 has been amended from time to time during the course of these proceedings, but remains substantially unchanged. Appendix E to the Petition contains the present provisions (App. E, 33a-46a).

Question Presented

Whether disclosure to a charging party or other person outside the Government of employment discrimination charges made against an employer and information acquired by the EEOC during the investigation of such charges violates §§706(b) and 709(e) of Title VII.

Statement of Supplemental Facts

Associated supplements the Statement of Facts contained in the Petition (at 4-9) to more clearly describe the circumstances under which this case arose.

From 1971 through 1973 several employees and former employees of Joseph Horne Company, a division of Associated, filed charges of employment discrimination against the Company (App. D, 17a). All but one of these charges alleged sex discrimination. In February and April, 1974, the EEOC began investigating the charges by serving interrogatories on Horne's (*Id.*). These interrogatories sought a wide range of information on Horne's business and employment practices, not limited to the situations of the individual charging parties. 419 F. Supp. at 817.

Horne's refused to answer the interrogatories without assurances from the EEOC that the information sought would not be disclosed to the charging parties, their counsel or others (App. A, 3a; App. D, 17a).[5] The Company's

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[5] Contrary to the suggestion in the Petition (at 7), the Company's concern was not merely with disclosure to "the [immediate] Charging parties, their counsel, or persons interviewed during the Commission's investigation." Its request to the EEOC stated:

> Prior to making relevant information available to you, we would like written assurances that the information contained in the records you seek will not be disclosed to the charging

reluctance stemmed from a Commission employee's transmittal of the February, 1974, interrogatory—containing the names of all the charging parties and their case numbers, and questions from which the nature of their charges could be inferred—to an attorney for one or more[6] of the charging parties. 419 F. Supp. at 817.

The EEOC could not offer these assurances (App. D, 17a). On the contrary, it stated that its policy was to disclose to charging parties not only their own case files (including information provided by the employer in response to EEOC interrogatories), but "related case files," as well—those involving the same employer which were compiled during investigation of similar charges filed by other individuals (*Id.*; App. E, 43a). The only restriction placed on disclosure of materials in these files by the EEOC was that the charging party use the information in connection with pending or "contemplated litigation" and (subsequent to June, 1975) agree in writing not to make the information public except in the normal course of a civil action or other proceeding under Title VII (*Id.*; App. E, 38a). The EEOC conceded, however, that it had "no way of preventing charging parties from transmitting information" to others (App. D, 17a-18a).[7]

> parties, their counsel, or persons whom you interview during your investigation. Moreover, in the event you are unable to give us satisfactory assurances, we would like to be advised concerning the safeguards you provide which will preclude said persons from in turn transmitting this information to others. (Joint App., Fourth Cir. Nos. 78-1695, 1696, at 31).

[6] The attorney, moreover, represented some local labor unions with whom Horne's had collective bargaining agreements. 13 FEP Cases at 892.

[7] In June, 1976, one of the charging parties whose charge was involved in the interrogatories commenced a Title VII action against Horne's alleging that the Company had engaged in sex discrimination against women as a class. Prior to filing suit, the

The parties were unable to resolve their differences and, after the EEOC subpoenaed the records in dispute, this litigation followed. As recalled in the Petition (at 8), Associated prevailed in its action to invalidate the EEOC's disclosure rules and enjoin their use, but the Commission obtained enforcement of its administrative subpoena against Horne's.

GROUNDS FOR DENYING REVIEW

I.

The EEOC Seeks Review of an Issue Not Presented to the Courts Below.

The Commission characterizes the question to be reviewed as:

> Whether Sections 706(b) and 709(e) of Title VII . . . prohibit the Equal Employment Opportunity Commission, prior to the institution of a suit, from disclosing information obtained during its investigation of a charge *to the parties immediately involved in the charge.*

(Pet., at 2) (emphasis added). This issue was not presented to the courts below.

As the opinions of the district court and court of appeals make clear, the question below was whether the Commis-

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plaintiff's attorneys were permitted access to her EEOC case file and to the files of other employees who had filed sex discrimination charges against Hornes. Although the EEOC disclosed this information, it evidently never sought a written agreement of nondisclosure prior to permitting counsel to examine the files of other employees, for it could not provide the date on which the examination was made. (Joint App., Fourth Cir. Nos. 78-1695, 1696, at 158-159).

sion's regulations (now §§1601.22 and 1610.17(d)) and special disclosure rules (EEOC Compliance Manual, Section 83), in their entirety, are contrary to the restrictions on disclosure imposed by Sections 706(b) and 709(e) of Title VII (App. A, 3a; App. D, 19a-21a).[8]

Section 1601.22 purports to exclude from the confidentiality requirements of sections 706(b) and 709(e) of Title VII "such earlier disclosures to charging parties, or their attorneys, or witnesses where disclosure is deemed necessary for securing appropriate relief." (Pet., 3-4).[9] Section 1610.17(d) affirmatively makes the Commission's special disclosure rules applicable to "charging parties. . . ." (Pet., 4). Neither of these regulations is limited "to the parties immediately involved in the charge." [10]

The special disclosure rules even more clearly depict the gulf which separates the issue raised from the issue decided. They permit charging parties who are potential litigants

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[8] The issue presented by the EEOC in the court of appeals was: "Whether the disclosure to *a charging party* before litigation of *investigative material relevant to the charge* is making the information public in violation of Sections 706(b) and 709(e) . . ." (Brief for the EEOC, Fourth Cir. No. 78-1696, at 1) (emphasis added). The expression, "a charging party," is significantly broader than the limited term, "the parties immediately involved in the charge," and, when considered together with the reference to "investigative material relevant to the charge" (as "relevance" is defined by the EEOC), clearly refers to the expansive disclosure policy at issue in the courts below.

[9] Former section 1601.20 excluded "such earlier disclosures to the charging party, the respondent, [or] witnesses . . . as may be appropriate or necessary to the carrying out of the Commission's functions under the Title. . . ." (App. D, 19a n.2).

[10] The EEOC also construes former section 1601.20 as having "authorized disclosure to the immediate parties [and] witnesses . . . ." (Pet., 7 n.2). This view is similarly unsupported by the language of the regulation.

> access to information in other case files involving the same respondent which are available in the same District Office or Office of Systemic Programs, provided that the information in the other case files is relevant or material to the private litigant's case.

(EEOC Compliance Manual, §83.7(c)(1), App. E, 43a). Relevance and materiality are generally established "when other case files contain charges, investigations or determinations involving the same basis (e.g., sex, religion, national origin, race) . . . ." (*Id.*). Persons other than parties or their attorneys presumably may also benefit from this early disclosure (*Id.*, §83.5, App. E, 36a).

In the courts below, the EEOC sought to uphold the regulations and special disclosure rules in their entirety. Indeed, even here the Commission maintains without qualification, "[t]his petition presents the question of the validity of these disclosure provisions." (Pet., 6). If that is the EEOC's intention, the Commission has not framed its question properly.[11]

The Petition is inappropriate.

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[11] In his concurring and dissenting opinion in the court of appeals, Judge Hall expressed the view that although the EEOC's rules permitting a charging party to inspect the files of other charging parties prior to a suit involving those files violated Title VII, the rules authorizing the inspection of the charging party's own file were permissible (Pet., 9a, n.2). It is not clear whether the EEOC is now advocating the position taken by Judge Hall. Even if it were, however, we would not agree that the issue of disclosure to "immediate" parties is appropriate for review. In light of the Commission's concession that it has "no way of preventing charging parties from transmitting information" they obtain from their own files to others, the issue is an illusory one. The only appropriate question is the one considered below: whether the broad disclosure authorized by the Commission in its regulations and Compliance Manual violates Title VII.

II.

The Uniform Authority of Recent Circuit Decisions Rejects the EEOC's Disclosure Rules.

The primary argument which the EEOC makes in support of its Petition is that there is "an irreconcilable conflict among the circuits." (Pet., 9).

The only appellate decision holding in favor of the EEOC on the issue of early disclosure was rendered seven years ago in *H. Kessler & Co.* v. *E.E.O.C.*, 472 F.2d 1147 (5th Cir.) (en banc), *cert. denied*, 412 U.S. 939 (1973). Although the decision does exclude immediate charging parties (and their counsel) from the definition of "public" in §§706(b) and 709(e) of Title VII, *Kessler*, at bottom, did not turn upon an analysis of statutory language. Recognizing that only "slender wisps of legislative history" supported its holding, the Fifth Circuit ultimately was persuaded by a policy argument: "that the charging party literally needs all the help he can get in order to procure counsel, convince him that a right of action truly exists with evidence to support it, and prepare and file suit within the statutory period." 472 F. 2d at 1150, 1151.

The decision in *Kessler*, however, was not unanimous. Four judges dissented. They cited the absence of legislative support for the court's decision and, even more significantly, the majority's disregard for a countervailing policy requiring "the preservation of that spirit of voluntary and cooperative disclosure so necessary to obtain unlitigated compliance . . . ." *Id.*, at 1152, 1153.[12]

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[12] The district court in *Kessler* (53 F.R.D. 330 (N.D. Ga. 1971)) and a panel of the Fifth Circuit (468 F.2d 25 (1972)) had reached a conclusion consistent with the dissenting opinions en banc.

Prior to 1979, the two circuits other than the Fifth which had considered the Commission's disclosure practices had agreed with the dissenting views in *Kessler*. *Sears, Roebuck & Co.* v. *E.E.O.C.*, 189 U.S. App. D.C. 163, 581 F.2d 941 (1978), and *Burlington Northern, Inc.* v. *E.E.O.C.*, 582 F.2d 1097 (7th Cir.), *cert. denied*, 440 U.S. 930 (1979).[13] The decision below draws the Fourth Circuit to their standard. These courts, unlike the Fifth Circuit, have had the benefit of considering Section 83 of the EEOC Compliance Manual, as well as the 1972 amendments to Title VII which now "[give] the private Title VII litigant adequate means of prosecuting the litigation." *Sears, Roebuck & Co., supra*, 581 F.2d at 947-948 (footnote omitted).[14]

Since the rationale of *Kessler* has been eclipsed by subsequent legislation, agency rules and interpretations, this Court should refrain from reviewing the issue presented by the EEOC at least until the Fifth Circuit has had an opportunity to reconsider its holding. The conflict in the circuits is more apparent than real.

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[13] The EEOC seeks to distinguish *Sears, Roebuck & Co.* and *Burlington Northern* from the instant case on the ground, *inter alia*, that they "involved the additional issue of whether Section 709(e) prohibits disclosure to the named plaintiffs in actual or threatened class actions comprehending employees allegedly discriminated against." (Pet., 11 n.3). Far from being a ground for distinction, this may be a basis of similarity. See n. 7, *supra* p. 4.

[14] Although the 1972 amendments to Title VII had already taken effect at the time the Fifth Circuit passed upon *Kessler* en banc, the court did not refer to the pertinent amendments in its decision.

III.

This Court Previously Has Declined to Review the Issue Presented by the EEOC.

The issue sought to be reviewed by the Commission is not unfamiliar to the Court. A substantially similar question was raised by the Government in its petition for certiorari in *Burlington Northern, supra* (No. 78-946, petition filed December 12, 1978, reported at 47 U.S.L.W. 3512-3513 (1979)). This Court denied review. 440 U.S. 930 (1979).

No reason appears warranting a different result here. The same alleged conflict in the circuits on which the Solicitor General relies now was present a year ago. Furthermore, the Fourth Circuit's brief opinion in the main simply adopts the rationale of *Burlington Northern* and *Sears, Roebuck & Co., supra* (App. A, 6a). Thus, the legal issues have not been substantially refined by virtue of the present case.[15]

A writ of certiorari would be inappropriate in these circumstances.

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[15] We note, too, that this Court denied certiorari in *Kessler, supra.*

IV.

The Decision Below Is Correct and Does Not Impose a Substantial Hardship on the Commission.

The Government argues that the restrictions on the publication of charges and investigative data contained in Title VII apply only to dissemination to members of the public other than charging parties and employers, and, therefore, the courts below decided this case incorrectly (Pet., 11-12). A similar argument, based on the "scant legislative history" of the Act and the reasoning in *Kessler,* 472 F.2d at 1150, 1151, has been received coolly. *Sears, Roebuck & Co.* v. *E.E.O.C.,* 581 F.2d at 945-946, 948 n.9; *Burlington Northern, Inc.* v. *E.E.O.C.,* 582 F.2d at 1099, 1100-1101. The same welcome awaited it in Richmond (App. A, 6a; App. D, 22a-25a). We think the decisions below were proper for the reasons expressed in *Sears, Roebuck & Co.* and *Burlington Northern.*

The Government's contention that the issue it presents is of substantial importance (Pet., 13-15) is based on a constricted reading of decisions adverse to its position. None of the recent courts of appeals decisions seek to shackle the EEOC in the performance of its statutory duties. They contemplate that some information must be communicated to parties and witnesses in the course of an investigation in order to obtain corroboration (See, e.g., App. D, 6a). That is a far cry, however, from asserting, as the Solicitor General does here, that the large amounts of confidential business or personal information contained in EEOC investigative files should be made public. Since the recent decisions of the courts permit the Commission to perform its investigative functions, the concern voiced by the Solicitor General is unfounded.

The Petition should be denied.

CONCLUSION

WHEREFORE, for all of the foregoing reasons, the Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit should be denied.

Respectfully submitted,

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